UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 19

BRUSCO TUG AND BARGE CO.

Employer

and Case 19-RC-13872

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, PACIFIC MARITIME REGION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

- 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- 2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
 - 3. The labor organization involved claims to represent certain employees of the Employer.
- 4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
 - 5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All mates, deckhands and engineer/deckhands employed by the Employer on vessels operated by the Employer out of its Longview/Cathlamet, Washington, home port;

Excluded: All guards and supervisors as defined by the Act, including all captains, and all other employees.

Facts

The Employer is engaged in the operation of tugboats on the west coast of the United tates. Petitioner seeks a unit of captains, mates, deckhand/engineers, and deckhands performing offshore to towing out of the Employer's Longview, Washington, port, excluding all guards and supervisors as defined in the Act and all other employees. The Employer contends that captains and mates are statutory supervisors, and, further, that a unit limited to offshore is not appropriate. In addition, the Employer contends that if captains and mates are found not to be supervisors, the unit should include all of its unrepresented captains and mates. Currently, all of its engineers and deckhands who are not sought by this petition are already represented, in all but one case by other labor organizations.

The Employer operates a total of about 34 tug boats. The home port for approximately 25 tugs is Cathlamet, Washington, approximately 25 miles down the Columbia River from the Employer's corporate headquarters in Longview. In addition, three boats are home ported in Port Hueneme, California, three are in Sacramento, California, two in Stockton, California, and one in Grays Harbor, Washington. The Employer is signatory to a collective bargaining agreement with Seafarers International Union covering deckhands and engineers employed at Port Hueneme; with Inlandboatmen's Union covering the deckhands on the tug Mary Rose Brusco at Grays Harbor; and with Petitioner covering a unit of masters, mates, deckhand/engineers, and deckhands in San Francisco Bay, the Sacramento River, and the Stockton deep water channel. The San Francisco agreement specifically excludes "towing between offshore ports."

The Employer tows a variety of barges and commodities, including: chip barges from various locations in Canada, Alaska, and California, to the Columbia River and to Eureka, California; log barges equipped with cranes from Alaska and Canada and other points on the west coast of the United States, to Eureka, California, Coos Bay and Newport, Oregon, and the Columbia River; sand barges from Sozol, Mexico, to San Diego, California; a self-loading barge for hauling rocks on the Columbia River; target sleds for the U.S. Navy off Point Mugu in California; dump scows assisting dredging projects; and occasional tows of individual barges on the River or along the coast. In addition, the Employer's tugs assist ships in and out of Port Hueneme, California.

Two types of tug boat activity emanate from the Cathlamet home port: inland (Columbia River) and offshore (Pacific Ocean). Inland tugs operate on a daily basis, up to 12 hours per day. They tow or push barges between various points on the river, including about seven trips a year to Lewiston, Idaho, and back, a round trip of about seven days. Such a journey requires passage through locks. The master on a vessel passing through the locks must have personal knowledge of the individual locks, including the currents, size, approach, and exit. Inland boats are manned by a master and one deckhand.

Offshore tugs tow barges between various points along the Pacific coast, anywhere from Vancouver, British Columbia, to ports in Mexico. Offshore tugs are manned by a captain, mate, engineer, and deckhand; a few have two deckhands. A crew is on a boat for approximately 30 days, then has 30 days off. At sea, they are on duty in six-hour shifts, the captain and one deckhand or engineer on one shift; the mate and the other crewman on the next. The captain or mate on duty steers the vessel. The Employer makes an effort to have each 30-day trip begin and end in Cathlamet, but when that is not possible, crews are flown to and from another port.

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The term "captains" is synonymous with "masters."

As amended by Petitioner at hearing.

Different types of tug boats are used offshore and on the River. Offshore boats all have a V-bow, are bigger and heavier, and are water-tight. Inland boats have less freeboard, less tolerance for rough water, and are not water-tight. Some inland boats have a V-bow, others have square bows with pushing "knees." Some have pilot houses elevated 30 or 40 feet.

Captains and Mates.

Captains and mates who work only in inside waters have an "uninspected vessel" towing license for inland waters of the United States, called an inland, or inside, license. There are two types of outside licenses for captains and mates who work offshore: an all-oceans license, which allows them to work anywhere; and near-coastal, which allows them to operate within 200 miles of the U.S. coast. The licenses are issued by the US Coast Guard.

Aboard a boat, the captain has authority to decide when to leave port; when, for weather reasons, to put into a port or to turn the boat around on the river; what course to follow; what groceries will be purchased, and whether to put a crewman off the boat for disciplinary reasons. On offshore boats, the captain decides which crew member will work which six-hour shift. When the mate is on duty, he has the same authority as the captain with respect to navigation and putting into port in bad weather. In the event that a crew member becomes ill, the captain or mate on duty can decide whether it is necessary to put into port. Each boat carries a cell phone, which can be used to contact the Employer, although there are occasions on the ocean when such contact is not possible. There are approximately 11 captains and nine or ten mates employed out of Longview/Cathlamet, including three captains on inland boats.

David Seaberg is the port captain in Longivew/Cathlamet. He is responsible for assigning crews to boats, and for dispatching the boats. He interviews all job candidates, and has final authority to hire and promote.

Seaberg always honors captains' requests that a particular individual not be assigned to their boats. Thus, when captain Shawn Sarff was unhappy with a particular deckhand, and told Seaberg not to put that deckhand with him, Seaberg thereafter assigned the deckhand to another boat. Captains recommend promotion of mates to captain, and of deckhands to mate. For example, Mark McKinley was promoted to relief captain based on the recommendation of captain Jim Strickland; Shawn Sarff was promoted from mate to captain on the recommendation of captain Rodney Ochiltree; and Bill Stucki was promoted from deckhand to mate on the recommendation of Sarff. Seaberg testified that the captains probably have more "ultimate involvement" in promotions than he does himself; that he does not go out on the boats. He said, "We trust [the captains] so much, and when they recommend it - they're out there sailing, we're not, and they know who can do the job and who can't do it. They're more qualified to choose that person [than], really, we are."

Offshore boats tow barges behind them. Connecting the barge to the boat is a process involving the entire crew. The captain maneuvers the boat. The mate is the "boss" on deck. The captain puts a crewman on the barge, who passes over a towing bridle to the boat. Not all crew members are equally agile. The captain decides which crew member will go aboard the barge, and which will stay on the boat. In docking, in calm conditions, the captain brings the boat alongside the barge, several lines between them are attached, and then the barge is nudged into the dock; in rough conditions, an assist boat is also

Undefined in the record.

Storms including 50-foot seas may occur offshore. High winds along the Columbia River can cause extremely rough water and, when combined with low temperatures, icing.

used. Inland boats equipped to push barges get behind the barge and fix lines as needed. Some inland boats tow rather than push barges. With respect to certain activities, Sarff testified, under cross examination, as follows:

- Q The docking or tying up of the barge is something you've done in the past year how many times?
- A All my life as an adult.
- Q It gets a little routine after a while?
- A Yes.
- Q So although you make certain independent judgments on your job, many of them tend to be routine things that you've gone through again and again and again. Is that correct?
- A Yes. We try to make them routine. It's safer if it's routine. Everybody knows what they're doing if it's routine.

The captains and mates keep a daily log in the wheelhouse, into which they enter such items as the daily activities of the boat, any disciplinary actions, fuel and oil, and maintenance. The log is faxed on a daily basis to the Employer's office in Longview.

Witnesses testified generally that captains and mates give different assignments to deckhands depending on the deckhands' qualifications, but there are no specific examples in the record, other than the aforementioned example of designating which deckhand will board a barge. There is also testimony that captains and mates can authorize overtime and choose which deckhand gets it, but there are no specific examples in the record of any captain or mate doing so, or of the circumstances under which overtime might be so authorized. There is contradictory testimony regarding whether captains negotiate pay rates for their crews; that is, one Employer witness testified that they do, while another Employer witness who is himself a captain, testified that he has never done so. That same captain testified that he has a deckhand whose home is in Cathlamet, and that when the boat is in that port, he will allow the deckhand to leave the boat to go home during his six hours off-watch.

In evidence is the Employer's "Responsible Carrier Operation Plan," which was prepared in cooperation with a voluntary program sponsored by the American Waterways Association in response to an incident some years ago in which an inland boat in the eastern United States struck a bridge, with the result that a train plunged into a river, killing several people. The document sets forth the Employer's policy with respect to operating procedures, safety, environmental matters, incident reporting, emergency response, incident investigation procedures, levels of authority, and hiring policy. A copy of the document is aboard all of the Employer's vessels, and there is a requirement that all crew members read it, although such requirement has not been strictly enforced.

The plan states that:

The Captain has complete responsibility for the safety of the crew and the vessel, which includes insuring that each crew member is capable of carrying out his duties in a safe and seanmanship like manner and that the vessel is capable to handle the task that it is assigned to. The Captain is also responsible for ensuring that all safety and operating procedures are complied with on board

his vessel. The Captain must use the judgment of a prudent mariner and stop operations when conditions dictate. ...

The Captain of the vessel is the Master. In his absence his relief is Master. ... The Master is responsible for the safe and efficient operation and performance of his crew, vessel, and tow, and for ensuring that the equipment is kept neat, clean, and in good working order. The Master must also ensure that company policy, rules, and regulations are followed.

The Master is responsible for setting the watchstanding schedule for the crew; ensuring that all crewmembers are familiar with their respective duties and stations in case of emergency; inspecting all areas of the boat and tow; ensuring that all barges are in navigable condition and reporting any deficiencies; maintaining the daily log; reporting personal injuries or illnesses of the crew; reporting accidents; and ensuring that proper safety equipment is on board and functioning properly.

In addition, the plan states that the Pilot (synonymous with "mate") is directly responsible to the Master and acts on his behalf when on watch, and must be familiar with the Master's responsibilities, authority, and duties in case the Master becomes incapacitated or leaves the vessel.

Conclusions as to captains and mates:

Section 2(11) of the Act defines a "supervisor" as:

. . .[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board over the years has considered the supervisory status of captains, pilots, mates and chief engineers on tugs, generally in the river-barge context. See *Local 28, MMP (Ingraham Barge Co.)*, 136 NLRB 1175 (1962) (masters and mates are supervisors); *Mon River Towing*, 173 NLRB 1452 (1969) (captains are supervisors); *A.L. Mechling Barge Lines*, 192 NLRB 1118 (1971) (pilots and mates not supervisors); *A.L. Mechling Barge Lines* 197 NLRB 592 (1972) (masters and chief engineers are supervisors); *Universal Towing Co.*, 198 NLRB 1124 (1972) (captains and operators are supervisors). There is no per se rule, the particular facts dictating the result in a particular context.

In Spentonbush Red Star Companies, 319 NLRB 988 (1995), rev'd 106 F 3d 484 (1997), the Board in upholding the ALJ's decision, found the evidence insufficient to establish that the captains at issue therein possessed any of the indicia of statutory supervisory authority. In particular, the Board found that the captain's authority to set maintenance schedules for chipping, painting, and cleaning, to assign work to the crew and inspect such work, to direct the crew in attaching the tug to a barge, and to direct the mate in loading and unloading the barge, were routine matters not requiring any independent judgment, or amounted to no more than the type of direction exercised by a more experienced employee over one who is less skilled.

More recently, the Board has been closely assessing the role of highly skilled and responsible individuals who make critical decisions, relying on their skills and training, and then communicate the decisions to other individuals to be carried out. The issue has been whether their decisions/communications involve "assignment of work" within the meaning of Section 2(11), and whether they "responsibly direct" the work force.

For example, in *Providence Hospital*, 320 NLRB 717 (1996), the Board discussed at length the issue of "responsibly to direct," observing that the term is ambiguous, in that, "the plain meaning of "responsible" is not, however, sufficiently precise to fully resolve this issue. The definition ranges from being held accountable for one's own actions, to being held accountable for the actions of others, and to being reliable." In that case, the Board went on to say it expects "that the analysis of most cases raising supervisory issues will be made pursuant to the Board's traditional approach of analyzing whether the direction is done with independent judgment."

In *Mississippi Power & Light*, 328 NLRB No. 146 (1999), the Board reiterated Congress' reasoning for adding the phrase "responsibly to direct" to the Act's enumeration of supervisory powers. The Board said:

A professional, technical, expert, or experienced employee is often required, as part of the employee's own job, to make detailed and complex decisions. The judgment required in making those decisions does not, however, "transform" that employee into a supervisor and, the mere communication of that information to other employees does not mean that the alleged supervisor uses supervisory judgment in assigning and directing others, especially when such assignments and direction flow from professional or technical training and do not independently affect the terms and conditions of employment of anyone.

See also, King Broadcasting Company, 329 NLRB No. 39 (1999); McGraw Hill Broadcasting Company, Inc., 329 NLRB No. 48 (1999).

The record herein reveals that crew captains have authority to effectively recommend transfer, in that their requests that particular crew members no longer be assigned to their boats are always honored. Further, the captains have authority to effectively recommend promotion. David Seaberg's testimony on this point makes it clear that management relies on its captains' assessments of individuals in promoting mates to captains and deckhands to mates. They are the highest authority on the vessels during their 30-day tour of duty. If they are not supervisors, then the port captain, Seaberg, is the first level supervisor, supervising the three (or more) person crews on perhaps a dozen vessels -- an extreme ratio of supervisor to employee, particularly when Seaberg never gets to observe their work, I also note that the captains do monitor their crews' performances on a daily basis. Finally, I note that it would be unlikely a crew would be sent of on 30-day voyages or tours of duty with no "on-site" supervision.

Accordingly, based on the foregoing, I conclude that the ocean captains are statutory supervisors, excluded from the unit, based on their regular ability to veto crew assignments and their effective recommendation of promotions.

Because the unrebutted testimony indicates that the river captains, whose trips are generally measured in hours, have the same crew veto and promotion recommendation authority as the ocean captains, I conclude that they are statutory supervisors as well.

As to the mates, they clearly are second in command on the vessels, subordinate to the captains. They do assign work, but there is no indication it requires independent judgment. Their heaviest "assignment" option seems to be selecting the more agile of two or three crewmen to go aboard a barge for the attachment of the towing bridle. Likewise, his direction of the "work force" (two or possibly three)

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This evidence alone is not necessarily sufficient to support a finding of supervisory status. The Board has said that a skilled employee's turning down a specific helper on a few occasions does not confer supervisory authority. *Southern Illinois Sand Co.*, 137 NLRB 1490 (1962).

hardly indicates the need for independent judgment beyond that of an experienced hand. It is obvious that a mate is always just steps away from the captain when the latter is off-duty. For a mate to be a supervisor along with the captain would make a silly 1:1 ratio on supervisors to supervisees. For all of these reasons, I conclude that the mates are not supervisors. See *Spentonbush Red Star Towing*, supra.

Unit Issues.

There are approximately 12 engineers and 17 deckhands involved herein, in addition to the 9-10 mates. All are dispatched out of Longview/Cathlamet. About four regularly work on river boats. The Employer has no other unrepresented engineers or deckhands, but all mates are unrepresented, except in San Franciso. Seaberg testified that he assigns deckhands "anywhere" they are needed.

Some deckhands are licensed as able-bodied seamen, others as ordinary seamen. Three of the deckhands are crane operators, that is, they operate cranes mounted on barges to load logs. Deckhands cook, clean, handle lines, and perform general maintenance, such as painting the vessel. Engineers are responsible for the engine room and deck gear, and help out on deck when they "make break-tows."

Deckhands who work on boats on the Columbia River are assigned to trips on a daily basis, that is, a trip lasting up to 12 hours each day. On longer trips upriver, such as to Lewiston, Idaho, the boat is underway for 12 hours, stops for 12 hours, then continues. Deckhands and engineers on outside boats, that is, ocean-going boats, are assigned to trips of approximately 30 days length, then have 30 days off. There is no record of any other distinctions between inside crew and outside crew, other than that an inside crew is on the river, while an outside crew is on the ocean. Offshore crew are paid a day rate, while inland crew are paid an hourly rate. The record is silent with respect to amounts. All deckhands receive the same benefits.

Petitioner seeks to represent only outside crew members. In this regard, Petitioner points out that different types of boats are used for offshore and inland work, the offshore boats being bigger, heavier, watertight, and generally having different bows than the river boats. Further, the hours, working conditions, and wages differ.

I note that both inland and offshore deckhands are assigned to boats by Seaberg, that they all perform similar functions, receive the same fringe benefits, and are subject to the same Employer policies. Further, there is no evidence that the inland boats are in a separate department of the Employer's organization. The home port of all the boats involved herein is Cathlamet, and Seaberg is the port captain for all such boats. The working conditions of inland and offshore differ in some respects, but are similar in others. Regrettably, the issue of interchange among inland and offshore deckhands was not explored in the record, and the only evidence in this regard is Seaberg's testimony that he assigns crewmen wherever they are needed. Offshore crew are not arguably a separate craft or departmental unit. On the record herein, I conclude that inland crewmen share a strong community of interest with offshore crewmen such that they must be included in the unit with them.

Petitioner seeks to represent only those mates who are employed at, or regularly dispatched out of, Longview/Cathlamet. The Employer contends that all its unrepresented mates, including those dispatched out of home ports in California, must be included in the unit. In so contending, the Employer relies on *Ocean Tow, Inc.*, 99 NLRB 480 (1952); *Inter-Ocean Steamship Lines*, 107 NLRB 330 (1954); and *Moore-McCormack Lines, Inc.*, 139 NLRB 796 (1962). In all of those cases, the Board stated its preference for "fleetwide" units, rather than single-vessel units, a principle to which the Board has

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⁶ Undefined in the record.

adhered, although in *Keystone Shipping Co.*, 327 NLRB No. 163 (1999), the Board noted that special circumstances may indicate the unsuitability of applying the fleet-wide rule. Thus, the scope issue usually depends on what constitutes a "fleet." Is it all of the vessels operated by a particular employer in whatever waters? Or is it the vessels operated by an employer out of a particular port? Or, all vessels administratively attached to a distinct geographic segment? I note that in *Moore-McCormack*, supra, the Board refers to two "fleetwide" units of the same employer, one on the Pacific coast, and the other on the Atlantic and Gulf coasts. It thus appears that "fleetwide" is not necessarily synonymous with "employer-wide."

Assuming arguendo that "fleetwide" in the instant case would extend to the Employer's entire fleet, any preference for such a broad unit has been largely obliterated by the past fragmentation of the fleet. Thus, the fleet has been cut into smaller pieces already, at Port Hueneme, Grays Harbor, and San Francisco/upstream. Petitioner does not seek to represent any employees in the established piecemeal units that it does not already represent, nor does it seek to combine the one unit it already represents with the instant unit if successful in the vote. If I were to combine all mates (or unrepresented mates) fleetwide, it would create the odd result that the unit would include all mates, but not all deckhands or all engineers.

For all of these reasons, primarily serparate supervision, lack of demonstrated interchange and prior fragmentation, I conclude that a unit limited to boats home-ported out of Cathlamet, Washington is the minimum appropriate unit, and that it need not include the miscellaneous, unrepresented mates in other ports.

I conclude that the appropriate unit here is one which includes only mates, engineers and deckhands on vessels operated by the Employer out of Longview/Cathlamet.

There are approximately 39 employees in the unit.⁷

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INTERNATIONAL ORGANIZATION OF MASTERS, MATES and PILOTS, PACIFIC MARITIME REGION, AFL-CIO.

Should Petitioner not wish to participate in an election in the unit found appropriate herein, it may withdraw its petition without prejudice by giving notice to that effect to the Regional Director within ten (10) days from the date of this Decision and Direction of Election.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Seattle Regional Office, 2948 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, on or before December 3, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by December 10, 1999.

DATED at Seattle, Washington, this 26th day of November, 1999.

/s/ PAUL EGGERT

Paul Eggert, Regional Director National Labor Relations Board, Region 19 2948 Jackson Federal Building 915 Second Avenue Seattle, Washington 98174

177-8540-4400 460-5067-3500